

MEMORANDUM OF LAW

DATE: December 14, 1988

TO: Ed Ryan, City Auditor and Comptroller;
William Schempers, Jr., Deputy Director,
Engineering & Development
FROM: City Attorney
SUBJECT: Changes in State Planning and Zoning Laws -
AB 1600

This is in response to your memoranda requesting information on AB 1600. I apologize for the delay in response and hope the following addresses your needs.

QUESTION

1. Is the City of San Diego, as a Charter City, exempt from the requirements of AB 1600?

ANSWER

1. No, charter cities are not exempt. AB 1600 amends Division 1 of Title 7 of the Government Code by adding Chapter 5 (commencing with 66000). Section 66001(a) states that the procedures outlined in AB 1600 apply when local agencies establish, increase or impose a "fee as a condition of approval of a development project" A "local agency" as defined in Section 66000(c), includes, "Any county, city, whether general law or chartered."

QUESTION

2. Is the Facilities Benefit Assessment program, as established by Section 61.2200 et seq. of the Municipal Code exempt from the requirements of AB 1600?

ANSWER

2. Yes, the Facilities Benefit Assessment ("FBA") is exempt from AB 1600.

Section 66000(b) defines "fee" as a "monetary exaction, other than a tax or special assessment. FBAs are considered to be a special assessment. (See Municipal Code section 61.2200(e).)

QUESTION

3. Section 66000(b): This Section defines the term fee as being a monetary exaction charged in connection of approval of a development project. The City Council has established a series of public facilities impact fees that are applied uniformly throughout a given community at the time a building permit is issued. Since there is no specific Council action in approving or disapproving a project at the time a building permit is

issued, (1) which is the action that requires the payment of the impact fee?; (2) is the City of San Diego's impact fee program exempt from AB 1600?; (3) are Park Fees collected under Section 96.0403 of the Municipal Code exempt from AB 1600?

ANSWER

3. (1) While AB 1600 is not altogether clear on this point, it is believed that AB 1600 comes into effect when the granting of the permit is a discretionary act, as opposed to a ministerial act. Examples of discretionary permits include approvals given to individual projects such as subdivision maps, use permits and zoning changes, since such approvals may be approved, denied or conditionally approved. Such projects will probably have to be reviewed on a case-by-case basis to determine if AB 1600 applies.

(2) No, the City's impact fee program is not exempt under AB 1600.

(3) It does not appear that Park Fees collected under Section 96.0403 of the Municipal Code would be exempt under AB 1600, except to the extent fees are collected under Government Code section 66477 (fees collected in lieu of parkland dedication).

Government Code section 66000(d) defines public facilities (for which fees under AB 1600 are collected) "includes public improvements, public services, and community amenities." It would appear at this time that the collection of fees for parks would come under the term "community amenities."

QUESTION

4. Section 66001(a): This Section is applicable on or after January 1, 1989. Typically, standard procedure in Subdivision Board Resolutions approving tentative maps includes a statement that the project is required to pay Development Impact Fees, as previously established by the City Council. Does such action, or use of standard terminology, invoke this section of AB 1600?

ANSWER

4. Yes, it appears that AB 1600 would apply in this instance.

QUESTION

5. If the answer to the preceding is yes, what is the situation involving a tentative map approved prior to January 1, 1989 for a final map that will be brought to Council after January 1, 1989?

ANSWER

5. This is another area which is not entirely clear but it would seem that the best practice would be to require the funds derived under these circumstances comply with all provisions of

AB 1600.

QUESTION

6. If Section 66001 does apply to those maps in urbanized or planned urbanizing areas of the City where there is an impact fee, but not an FBA, then will it be necessary for each individual project to meet all of the requirements enumerated in Section 66001 or conversely, will a properly established Impact Fee Resolution suffice?

ANSWER

6. Yes it will be necessary for such individual project to meet all Section 66001 requirements.

QUESTION

7. Do the provisions of AB 1600 apply to Park Fees collected pursuant to Municipal Code Sections 102.0406.06 et seq.?

ANSWER

7. Yes.

QUESTION

8. Do requirements of AB 1600 apply to funds collected as a condition of tentative map to pay for various improvements such as traffic signals?

ANSWER

8. Yes, it is our view that AB 1600 applies to all such monetary conditions.

QUESTION

9. Section 66001(d): This section makes reference to certain findings that must be made once each fiscal year "With respect to any portion of the fee remaining unexpended or uncommitted in its account five or more years after deposit of the fee" There are three questions with respect to this section:

A. With respect to the term "the fee," is there any requirement to track or follow the use of the specific dollars received from a specific project? The current practice of the City is to establish a single fund for a given community and deposit all fee receipts into that one common fund. Thus, under the present accounting system, it is not possible to follow or track the receipt and expenditure of specific dollars from a specific building permit.

B. With respect to this section, the term "uncommitted" raises questions. For example, in the FBA program, there is a specific Financing Plan which identifies each and every project for which FBA funds are collected. Additionally, that Financing Plan identifies the specific year in which each individual FBA

project is programmed for funding. Thus, with respect to the FBA program, it appears that there are no uncommitted funds. Conversely, with respect to the impact fee program, there is no such specific identification of projects with respect to year programmed for construction, nor for the specific fund source for individual projects. During the development of the impact fee program for each of the various urbanized communities, projects were identified, total project costs were identified and the total demand for projects (Average Daily Traffic - ADT) for traffic projects, dwelling units for libraries, parks, etc., were identified. Additionally, there is an identification of the amount of development currently in existence, together with an identification of the amount of development "to go." However, to

date there has been no effort to make the final step and identify the exact mix of funds to be utilized on each particular project. By way of background, on average, the typical urbanized community is 85% built out and 15% to go. Thus, on average, the typical public facility should be funded 15% impact fee. However, from a practical standpoint, it may make more sense to fully fund some projects from impact fees and fully fund other projects from non-impact fee sources, maintaining the overall relationship of 15% impact fee, 85% non-impact fee. In any event, to date there has been no such specific Financing Plan or overall identification of funding and scheduling for the various projects that make up the needs lists that determine the amount of impact fees required. Will such a plan and determination be required within the next five year period in order to avoid problems with this section of AB 1600? Alternatively, would a simpler means of resolving this problem be to ensure that all funds are expended within five years of the actual date of collection, utilizing an appropriate accounting method to ensure that this is done?

C. Section 66001 d. states findings will be made once each fiscal year. Does this require a formal report of any kind or do we just need to maintain for our own records the findings we make and the refunds issued? In addition, are we required to make a finding on each individual fee collected?

ANSWER

9. A. Yes. See the requirements of SB 372, a companion measure to AB 1600, a copy of which is attached as Enclosure (1) to this memorandum.

9. B. Yes. In order to comply with AB 1600, it would appear that we should attempt to put together a Financing Plan for impact fees similar to the plan currently being used for FBAs.

9. C. We believe a formal "findings" resolution by the City Council is appropriate.

QUESTION

10. Section 66002 appears to indicate that if the fees referenced in Section 66001 are imposed and accounted for pursuant to a Capital Improvement Plan, then that Capital Improvement Plan must, among other things, be annually updated. Additionally, it appears that the subject Capital Improvement Plan would have to indicate the approximate schedule of when the

project for which fees are being collected would be built. With respect to this section, how specific would the City Council have to be in identifying the fund source for the non-impact fee portion of the project cost? Would a notation that in summary indicated that 85% of the project cost was unknown at this time and would be identified in the future be adequate, or would such a Capital Improvement Plan be considered defective?

ANSWER

10. We believe the funding sources for all expenditures should be included.

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By

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Attachment

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